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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, *Petitioner*,

v.

OVETA CULP HOBBY, ET AL., *Respondents*.

BRIEF OF PETITIONER

THURMAN ARNOLD,
ABE FORTAS,
PAUL A. PORTER,
MILTON V. FREEMAN,
Counsel for Petitioner.

ARNOLD, FORTAS & PORTER,
1229 - 19th Street, N. W.,
Washington 6, D. C.

FOWLER HARPER,
VERN COUNTRYMAN,
New Haven, Connecticut
Of Counsel.

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BRIEF OF PETITIONER

OPINIONS BELOW

The District Court wrote no opinion (R. 25). The judgment of the Court of Appeals, setting out the basis for its determination of the case (R. 28), is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The judgment of the Court of Appeals was entered on August 5, 1954 (R. 28). The Petition for Certiorari was filed on September 29, 1954. Certiorari was granted on November 15, 1954 (R. 29).

THE REGULATION AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Executive Order 9835, 12 F.R. 1935, March 21, 1947 (5 U.S.C. [Cumm. Supp.] following Section 631), as amended by Executive Order 10241, 16 F.R. 3690, April 30, 1951, and Article I, Section 9, Clause 3 and the Fifth Amendment to the Constitution of the United States. Their texts are set forth below in the Appendix to this Brief.

QUESTION PRESENTED

This case presents the same question presented but decided only by an equally divided court in *Bailey* v. *Richardson,* 341 U. S. 918:

Whether, following a loyalty board hearing which produced only favorable evidence, a person may be adjudged ineligible for government service and dismissed from non-sensitive federal employment as a result of secret information given by informants who were not under oath, who were not presented at the hearing and whose identities were not disclosed to the employee.

STATEMENT OF THE CASE

The case comes to this Court from the affirmance of a judgment on the pleadings for defendants in the trial court. Neither party introduced testimony or documentary evidence below. The statement which follows is therefore based solely on the facts pleaded in the complaint and the admissions and allegations of the defendants in their answer.

* * *

John Punnett Peters is an eminent physician and medical teacher. He is Senior Professor of medicine at Yale University (Cplt., Para. 4, R. 3; Ans., Para. 4, R. 15).

For some few years prior to 1951, Dr. Peters had been employed by the Public Health Service of the Federal Se-

curity Agency.[1] Peters served as a Special Consultant, retained to advise directly the Surgeon General. His only work related to proposals to grant federal assistance to medical research projects under the public health laws of the United States. It was non-sensitive. Dr. Peters at no time had access to confidential or strategic information (Cplt., Para. 5, R. 3; Ans., Para. 5, R. 15-16).

It is specifically admitted that "plaintiff was appointed to this position because of his eminence in the field of medical science and his service throughout the period of such employment was of value to the United States" (Ans., Para. 5, R. 16). In January of 1949, however, he received a letter from Joseph E. McElvain, Chairman of the Board of Inquiry on Employee Loyalty of the Agency, informing him that information "relating to his loyalty had been received" (Cplt., Para. 6, R. 4; Ans., Para. 6, R. 16). The letter enclosed a detailed interrogatory relating to various of Peters' political activities and requested him to supply the Agency with the information called for therein. Peters completed the form and returned it on January 17, 1949. Shortly thereafter the Board notified him that it had no evidence for holding him disloyal (Cplt., Para. 7, R. 4; Ans., Para. 7, R. 16).

Almost two years later, in December of 1951, however, plaintiff was informed that the Agency was to reconsider the question of his loyalty, this time through a formal hearing before its own Board of Inquiry. Again by letter, this one dated December 17, McElvain wrote him stating formally that some sixteen charges of questionable activity on his part had been noted, including this time, a charge of membership in the Communist Party of the United States (Cplt., Para. 8, R. 4; Ans., Para. 8, R. 17). By letter, Peters again answered the allegations. He cate-

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[1] The agency has since achieved departmental status. Pursuant to Reorganization Plan No. 1 of 1953 and Public Law 13, 83d Cong., 1st Sess., approved April 1, 1953, 67 Stat. 18, its functions were transferred to the Department of Health, Education and Welfare on April 10, 1953. Defendant Hobby is its Secretary.

gorically stated that he had never been a member of the Communist Party (Cplt., Para. 9, R. 4; Ans., Para. 9, R. 17).

Prior to the hearing, on March 13, 1952, McElvain sent him what purported to be "a written statement of certain information in the possession of said Board." He stated that "certain particular items of such information had been received from confidential informants whose identities were not disclosed by said statement" (Ans., Para. 10, R. 17-18).

The hearing of the Agency Board of Inquiry on Employee Loyalty was held in New Haven on April 1 and 2, 1952. In their answer, the defendants state:

> "The sources of the information as to the facts bearing on the charges against plaintiff were not identified at the hearing or made available to counsel for plaintiff for cross examination. The identity of one or more of the informants furnishing such information, but not of all such informants, was known to the Board. The Chairman stated that the Board did not know whether or not the information given by a confidential informant as to facts bearing on Charge No. 1 against plaintiff had been given under oath." (Ans., Para. 12, R. 18).

Peters adduced the only evidence during the entire two days of the hearing; no witness took the stand against him (Ans., Para. 13, R. 18). Peters swore under oath that he had never been a member of the Communist Party and answered all questions posed him by the Board and its counsel (Ans., Para. 14, R. 19). His testimony as to his loyalty was supported with "affidavits, letters or statements by approximately 40 additional persons" (*Ibid*).

Within two months, on May 23, 1952, McElvain wrote Dr. Peters stating that the Board of Inquiry had determined again that there was no doubt as to his loyalty (Cplt., Para. 16, R. 5-6; Ans., Para. 16, R. 19).

Some eleven months later, however, plaintiff received a letter from Hiram Bingham, Chairman of the Loyalty

Review Board of the Civil Service Commission, informing him that his case was to be reopened a second time, in this instance to permit the Commission's Loyalty Board to conduct a "post-audit" of the action of the Agency Board, "'hold a hearing and reach its own decision'" (Cplt., Para. 17, R. 6; Ans., Para. 17, R. 19). It was this third proceeding, instituted after more than four years of investigation, hearing and consideration of the matter and after two favorable decisions by the Agency's own Board, which resulted in the dismissal at issue in this case.

The panel of the Loyalty Board, composed of defendants Amen, Hessey and King, convened in New Haven on May 12, 1953 (Cplt., Para. 18, R. 6; Ans., Para. 18, R. 19). The defendants allege that:

> "at the hearing before the panel of the Loyalty Review Board the only evidence or testimony adduced was that adduced by counsel for plaintiff; that the identity of confidential informants who had given information with respect to the charges against plaintiff was not disclosed to plaintiff; that the identity of one or more of such informants, but not of all such informants, was known to the Board; and that the information given by such confidential informants was not disclosed under oath" (Ans., Para. 20, R. 20).

The Board also declined the request of plaintiff's counsel to reveal the identity of the confidential informant in the one instance where the informant's identity was known to the Board (Ans., Para. 21, R. 20). The Chairman stated that "the panel would consider evidence given by confidential informants not disclosed to the plaintiff" (Ans., Para. 22, R. 20).

When he took the stand, Dr. Peters again began by affirming his complete and unswerving loyalty to the United States. He testified categorically that he had never been a Communist (Cplt., Para. 23, R. 7; Ans., Para. 23, R. 20-21).

Five witnesses supported his statement. Two were former medical students. The other three were Charles

W. Seymour, ex-President of Yale University, Judge Charles E. Clark of the Court of Appeals for the Second Circuit, and C. M. Hugh Long, former Dean of the Yale Medical School. All testified to their firm belief in Peters' loyalty (Cplt., Para. 24, R. 7-8; Ans., Para. 24, R. 21).

In sum, all the evidence adduced at the hearing was the favorable evidence adduced by plaintiff, and the Board had only secret statements by unsworn, unidentified informants on which to base an adverse finding. As the defendants affirmatively state in their answer,

> "Defendants allege that at the hearing before the panel of the Loyalty Review Board no evidence was adduced except that adduced by counsel for plaintiff, but allege that the entire record on which the panel of the Loyalty Review Board considered plaintiff's case contained evidence contrary to that adduced by counsel for the plaintiff." (Ans., Para. 25, R. 21).

On this record, the Board made its decision that there was a reasonable doubt as to petitioner's loyalty to the Government of the United States. It notified petitioner that he was barred from government service for three years and the Civil Service Commission issued an order to that effect (Cplt., Para. 26, R. 8; Ans., Para. 26, R. 26). Acting on the Board's recommendation, the Surgeon General discharged Dr. Peters on June 12, 1953 (Cplt., Para. 27, R. 8; Ans., Para. 27, R. 21). Peters' counsel was not permitted to file a motion for hearing before the full Loyalty Board of the Civil Service Commission (Cplt., Para. 28, R. 8-9; Ans., Para. 28, R. 22).

Thus, all administrative remedies exhausted, petitioner instituted the present action. His complaint asked for a declaratory judgment that the separation from government service and declaration of ineligibility were invalid and for relief from the said declaration (R. 13-14). Following the Government's answer, both parties filed cross motions for judgment on the pleadings (R. 23-25). Both admitted that the issues in the case were controlled

by *Bailey* v. *Richardson*, 182 F. 2d 46 (D.C. Cir. 1950), affirmed *per curiam*, 341 U.S. 918. The District Court granted the defendants' motion and denied the plaintiff's (R. 25). The Court of Appeals *per curiam*, by a 2-1 vote, affirmed because, as it said, "[w]e feel obliged to follow the ruling in [*Bailey*] in the determination of the present case." (R. 28). Judge Edgerton dissented from the judgment on the grounds stated in his dissent in *Bailey* (*Ibid.*)

ARGUMENT

Three years have gone by since the validity of the procedure which we attack here was affirmed by an equally divided vote of this Court in *Bailey* v. *Richardson*, 341 U.S. 918. The arguments which we make now, therefore, have already been heard. These same arguments were presented by the petitioner in the *Bailey* case and were rejected by an evenly divided Court. We think the three years of experience with the loyalty program since the *Bailey* case have shown what could not be accurately determined at that time, to wit, the punitive character of this procedure and its lack of connection with actual national security.

We are now able to do what was impossible at the time of the *Bailey* case and that is to assess the consequences of this procedure after three years of trial. By observing the effect which the abandonment of due process in trials of this kind has had on the careers and morale of government workers we can reappraise the validity of the opinion of the Court of Appeals that this kind of procedure can be justified as a protection of national security. When we argued the *Bailey* case our two principal contentions were:

(1) That the President's Order designating proceedings before the loyalty board as an administrative hearing and declaring that the findings should be on all the evidence

could not be construed to authorize a decision based on secret information.

(2) That if the Order were construed so as to permit such action, it would be in violation of due process.

At the time that the *Bailey* case was heard the loyalty program was in its infancy. It had been instituted for the stated purpose of protecting both the Government and the accused employee. In that case the petitioner was challenging one of the earliest actions under that program —her removal from federal service because of a finding of disloyalty which had been based on derogatory information not disclosed to her. The petitioner there argued that adequate power existed for summary discharge of employees where the national security was believed to be involved. She argued that where adverse findings on the issue of loyalty were made against an employee by a hearing procedure, due process required a fair hearing in the accepted sense.

The Solicitor General in brief and argument informed this Court that this procedure of using undisclosed derogatory information as a basis for a determination of disloyalty was at the very heart of President Truman's loyalty program. It was further argued by the Government that no punishment was involved within the terms of the Constitution when an employee was severed from his position, that the hardship of discharge under a finding of disloyalty was not a penalty in the constitutional sense. The unfairness of the procedure was said not to be a major hazard since the boards could be trusted not to use it except where it was essential to national security. On the basis of these assertions, it could then have been assumed that this procedure would not be invoked to punish but only to protect.

Under these circumstances, reasonable men might well have thought it a dangerous adventure for this Court to disregard the warning of the Government that the pro-

cedure was essential to national security, and to strike down this procedure as generally unfair to government employees before experience had shown how it was to be used.

But today we can look at this procedure with the benefit of hindsight. The arguments formerly used to support its constitutionality have been proved by the passage of time to be invalid. A principal argument of the Court of Appeals was that it was necessary to give the executive the power to make findings of disloyalty because otherwise it would not be free "to choose employees for executive duty" and "to remove those deemed not qualified", 182 F. 2d at 58. The Court of Appeals justified the making of the finding in the *Bailey* case on the ground that

> "No function is more completely internal to a branch of government than the selection and retention or dismissal of its employees". Ibid.

The majority argued that if such findings were interfered with by the court the executive might lose control over selection, retention and dismissal. They thought the finding of disloyalty a necessary incident to the power to discharge unfit persons.

The majority judges of the Court of Appeals in the *Bailey* case conceded that the procedure of making findings on secret evidence did not satisfy the requirements of judicial process. They argued that such process was not necessary because the power to remove Government employees was not limited in any way by the Constitution. We do not think they intended to hold that any sort of punishment could be meted out without a full hearing by the executive. They simply did not regard the finding of disloyalty as punishment. They said:

> "If dismissal from the classified civil service requires judicial process, all the cases noted in the footnote below, and many others, were erroneously decided, because they all upheld dismissal without such procedure." 182 F. 2d at 56.

In other words, the Court of Appeals believed that there was no difference between a discharge accompanied by findings of disloyalty and a discharge for inefficiency.

We think that the last three years have demonstrated beyond a doubt the vast difference between the two types of discharge. The one has become clearly a punishment, the other still remains only a hardship. We of course concede that the Constitution does not limit the power of the executive summarily to terminate employment on secret information or for any other reason. The question before this Court is only whether the Government has the right to accompany a discharge with a finding of disloyalty which ruins the reputation and career of the accused, without a full hearing.

The Court of Appeals' opinion in the *Bailey* case can be justified only if a finding of disloyalty is held not to be a punishment. It can be so held only if the finding is essential to the Executive's selection of its employees or else is so closely tied up with the national security that it can be said to be vital to the safe administration of a government agency. The passage of three years has shown that the finding promotes neither purpose.

So far as retention and control over personnel of an agency is concerned the experience of the past three years has shown that it is not only unnecessary, it is even destructive to the power to select and retain. It has made the executive in maintaining its personnel more than ever subject to the pressure of demands from irresponsible sources in Congress. Otherwise the executive might be regarded as soft toward Communism.

Further in this respect the procedure is actually interfering with the retention of employees by the Executive. Every employee knows that if charges are made against him by secret informers he will have no adequate opportunity to defend himself. He is therefore well advised to resign if he thinks there is a chance that some enemy has filled his secret dossier with unfavorable information.

These resignations are filling the papers today. To offer the employee the choice of resigning or staking his career on this procedure is a hazard, not a help, to the internal management of government agencies.

A trial without due process is at best a lottery on which no man should be asked to stake his career and reputation. But this particular lottery is not even a fair gambling device. The insistent and clamorous public demand that Communists be rooted out regardless of the insignificance of their duties loads the game against the employee. The pride that public officials have in disclosing numbers of men discharged for loyalty or security reasons does not instill confidence in their lack of bias in evaluating the contents of a secret dossier. The fact that the board making the decision often does not even see the secret informant or know who he is adds to the risk.

Reasonable men might have differed in 1951 when the *Bailey* case was heard on whether these consequences would follow if the procedure were affirmed. It is difficult for us to believe today that reasonable men can differ on whether these things actually have happened.

Experience with this procedure has also proved that the second justification for abandoning due process, i.e., that it is connected with national security, is equally invalid. The complete and utter lack of any connection with national security in the use of this procedure is dramatically illustrated by this case. So far as national security is concerned there was no necessity of trying Dr. Peters for anything. He spent only about ten days a year in Washington consulting in the Surgeon General's office. We can safely assume that he would not during such a short period have been able to convert his fellow doctors to Communism. But if it had been thought he was a danger, all the Department of Health, Education and Welfare would have had to do was to instruct the Surgeon General not to call him down for consultation any more. He was costing the Government nothing while he stayed at Yale. His appoint-

ment was about to expire and the Department could have let it expire without ever seeing him again.

Why then was it necessary so far as security was concerned to condemn him as disloyal without due process? The only possible reason for his trial by these methods is that it is apparent that Dr. Peters could not have been convicted by legal evidence. The Government was unable to produce any. From the secret information, the Board apparently was in doubt as to whether he was a Communist. On the basis of this doubt, it punished him. Certainly it was a punishment that the Board was seeking to inflict. Clearly in this case the Board was not trying to protect the Department of Health, Education and Welfare from any danger whatever.

We believe that in the case of *Wieman* v. *Updegraff*, 344 U.S. 183, this Court has taken judicial notice of the developments in the general loyalty program which we have described above. At the time of the *Bailey* case four of the members of this Court must have believed that a finding of disloyalty and a discharge on that ground was not a punishment in the constitutional sense so as to require due process. The Court of Appeals in the *Bailey* case so held. But in *Wieman* v. *Updegraff* a unanimous Court agreed with what we are saying here when it said:

> "There can be no dispute about the consequences visited upon a person excluded from public employment on disloyalty grounds. In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy. Especially is this so in time of cold war and hot emotions when 'each man begins to eye his neighbor as a possible enemy.'" 344 U.S. at 190-191.

Prior to the *Wieman* case the Court of Appeals in the *Bailey* case had said:

> "In terms the due process clause does not apply to the holding of a Government office." 182 F. 2d at 57.

That statement has been drastically modified in the *Wieman* case in the following language:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U.S. at 192.

We believe that an affirmative pronouncement by this Court that government employees should not be compelled to risk their reputations and careers without due process or a fair hearing would be hailed with relief even by those who are now putting men to trial by these procedures. We do not believe that the men who do this enjoy their tasks. We think they would like to give fairer hearings. But it is politically dangerous so long as this procedure is followed for any government official not to use it. To be more fair to persons suspected of Communism than is necessary under the law might well be branded as softness towards Communism.

That distinguished scientist, Dr. Vannevar Bush, who should certainly know as much as any man in this country about the problems of national security in the field of science, had this to say about the present workings of the program on December 30, 1954:

> "The scientist said the most important objective of 'our enemy' is to 'spread confusion and distrust among us.' But he declared that 'we are carrying on the process now without his prompting.'
>
> "He said the system adopted for persons doing secret work 'seems almost calculated to destroy their reputations by innuendo and charges based on spite.'
>
> "Bush said a principle has been adopted which is 'abhorrent' to American traditions — establishing guilt on the basis of simple association, putting in jeopardy men who did important war work because they express unpopular opinions, and denying men the right to make useful scientific contributions because of 'youthful indiscretions.'

> "Asserting that 'suspicion and distrust are rampant in the land,' he said 'this madness of ours' is much more threatening than the post-World War I 'witch hunts' and is even a greater momentary threat than that of a hostile power overseas.
>
> "'If all people knew the wide extent of the threat—which goes far beyond the few spectacular cases that make the headlines—if they understood how closely it fits into our enemy's design and how successful those designs are proving, then there would be reason to hurry,' Bush declared." The Washington Post and Times Herald, December 31, 1954, p. 1, col. 5

In this speech Dr. Bush was speaking about the program in general, a problem which is not before this Court. However, his statements have a most significant applicability to the process of conviction by secret evidence. Dr. Oppenheimer at least has a public record on which his countless friends can defend him. He at least had a chance before the tribunal which tried him. He faced his accusers. He had the benefit of dissenting opinions. The tribunal itself was put in a position of having to make a public analysis of the evidence.

But in cases like that of petitioner the punishment is inflicted by stealth and the employee may be ruined by mere gossip.

This Court has already said in the *Wieman* case that the Constitution does protect an employee from arbitrary or discriminatory exclusion from government service. That decision compels the reversal of this case unless this Court is prepared to hold that the conviction of a man on evidence which is not disclosed to him is not arbitrary. That we do not believe this or any American court would do.

We emphasize again that we believe no constitutional issue is involved where the Government discharges an employee without an adverse finding against him. A discharge in the discretion of the administrator for no reason or for reasons disclosed or undisclosed which are in the administrator's judgment related to the proper function of his office

raises no constitutional question. So far as the question raised by this case is concerned there would be no objection to a complete repeal of all civil service protection of government employees—to the return of the spoil system with its accompanying unlimited discretion to the executive. Our point is only that where a system is created of discharge and exclusion from government service on the basis of an adverse finding against the employee on the issue of his loyalty arrived at by a proceeding which has the appearance of a trial on the merits, the finding which is the basis of governmental action may not be arbitrarily made. It must be made by a hearing which is in fact a hearing with full opportunity to "test, explain and refute".

I. PETITIONER'S REMOVAL AND DISQUALIFICATION WERE NOT EFFECTED IN ACCORDANCE WITH THE PROVISIONS OF EXECUTIVE ORDER 9835.

The separation and disqualification were ordered—by the Department and the Board, respectively—under the purported authority of Executive Order 9835.[1] This order was promulgated on March 21, 1947.[2]

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[1] Executive Order 9835 is reprinted in full, Appendix.

[2] Prior to the end of World War II, the Civil Service Committee of the House was authorized to make a study of the loyalty of Federal employees. It recommended, in its report, that a commission be established of representatives of the War, Navy, State, Justice and Treasury Departments and of the Civil Service Commission, to propose a security program. Report on H.R. 66, House Committee on Post Office and Civil Service, 80th Cong., 1st Sess. President Truman adopted the recommendation in Executive Order 9806 establishing the President's Temporary Commission on Employee Loyalty. This Commission heard a number of witnesses and made its own report to the President, which he released on March 2, 1947. Its recommendations were largely adopted in the Executive Order establishing the Loyalty Program, cited above.

The history and operation of the Program are extensively surveyed in Bontecou, *The Federal Loyalty-Security Program* (1953).

The Order's preamble stated that the purpose of the program was to grant equal protection to the Government —against infiltration—and to Federal employees—against unjustified charges of disloyalty. Part I provided for the investigation of all applicants for positions, Part II for the investigation of employees. Responsibility for the latter program was lodged with department heads, who were ordered to appoint loyalty boards to hear the cases of accused employees. If the agency board recommended removal, the employee was to enjoy the right to appeal to the Loyalty Review Board of the Civil Service Commission. Part III gave the Civil Service Commission the duty to review such recommendations, to make rules and to advise the departments on all phases of the program. Part IV allowed a department head to request information relating to an employee from the FBI, and gave the FBI the power to withhold names of informers where essential. Part V stated that the standard against which an employee was to be measured was whether or not reasonable grounds existed for a belief of disloyalty. Part II was subsequently amended by Executive Order 10241, April 30, 1951, 16 F.R. 3690, providing the standard would thenceforth be whether there was reasonable doubt as to the employee's loyalty. It was under this standard that Peters was judged, though this fact is immaterial to the issues raised in this case.

The crucial provisions of the Order, for purposes of this case, provided that discharge was to be based on "evidence" developed at a "hearing".

Part II, Section 2.a.:

> "An officer or employee who is charged with being disloyal shall have a *right to an administrative hearing* before a loyalty board in the employing department or agency . . ."

Part II, Section 2.b.:

> "The officer or employee shall be served with a written notice of *such hearing* in sufficient time,

[which shall inform him] (2) of his *right to an administrative hearing* on such charges before a loyalty board, and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit."

Part II, Section 4:

"The *rights of hearing*, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure . . ."

Part V, Section 1. (as amended):

"The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, *on all the evidence*, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States."

(Italics added in each quotation.)[3]

In finding against petitioner the Board considered secret information undisclosed to him (Ans., Para. 22, R. 20, Para. 25, R. 21). The source of part of that information was not even known to the Board (Ans., Para. 22,

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[3] The program under 9835 came to an end on April 27, 1953, with the issuance of Executive Order 10450, 18 F.R. 2489. This order recites that national security is based on reliable Federal employees and American traditions require fair treatment of such employees. It provides that all applicants for Federal employment be investigated, and that the cases of all existing employees be readjudicated. Where information indicating that retention is not clearly consistent with national security is received, the employee is to be suspended and his case reviewed by the department. Section 8(a) of the Order sets out the information to be developed in this program. The various agencies are required to and have adopted regulations to carry out the program.

R. 20). Such a procedure cannot be considered as an "administrative hearing" in the terms of the Order, nor can such information be included by any stretch of the imagination under the term "evidence". It is a procedure far more consistent with the secret hearings of the Inquisition, or those adopted in the courtmartial of Alfred Dreyfus.[4] This same procedure was held by the President's Commission in Nuremberg in convicting German judges as the "final degradation of the judiciary".[5] We say that the Court must attribute to the Executive Order an intent to provide for a normal hearing on evidence in the traditional sense and to preclude the startling departure from Anglo-American procedure represented by the present case.[6]

II. PETITIONER'S REMOVAL AND DISQUALIFICATION WERE EFFECTED THROUGH PROCEEDINGS WHICH VIOLATED THE CONSTITUTION.

If the Order may be construed as permitting this procedure, then petitioner's removal and disqualification under it violate the Constitution of the United States.

1. *Bill of Attainder:* Disqualification from government service without a proper hearing constitutes a bill of attainder, forbidden by Article I, Section 9, clause 3 of the Constitution (Appendix). Petitioner here has been declared unqualifiedly ineligible for even a non-sensitive position in federal service. In sum, the Government has proclaimed him "disloyal" to all that the United States stands for. It has stigmatized him before his friends and his profession, by an *ad hoc* declaration. Clearly he has been "attainted" and penalized in violation of the

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[4] Dreyfus and Dreyfus, *The Dreyfus Case* (Yale University Press, 1937).

[5] *United States* v. *Joseph Alstoetter* (President's Military Tribunal, Nuremberg, Record available at Library of Congress).

[6] See cases cited and discussed, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 165-172.

constitutional provision. See *United States* v. *Lovett*, 328 U.S. 303, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 142 *et seq.* (concurring opinion of Mr. Justice Black).

2. *Due Process:* A hearing without minimal guarantees of fairness, violates the due process provision of the Fifth Amendment of the Constitution (Appendix) when it results in disqualification from government service on avowed grounds of disloyalty.

This was the issue presented in *Bailey* v. *Richardson*, *supra*. The Court of Appeals in that case, by a two to one vote, held that no constitutional right to relief existed on the facts there presented. It held that government employment was not strictly "property", "liberty" or "life". And for this reason it concluded:

> "In terms the due process clause does not apply to the holding of a Government office." 182 F. 2d at 57.

On certiorari to this Court, petitioner pointed out that she was not seeking to limit the right to deny federal employment where the denial is not based on adverse findings. Her challenge was directed solely to the procedure and consequences of discharge in her case based on a finding of disloyalty unsupported by evidence. However, this Court affirmed the Court of Appeals by an equally divided vote.

Since then, the ground on which the Court of Appeals based its holding has been specifically rejected by this Court. We rely on *Wieman* v. *Updegraff*, 344 U.S. 183. In that case, the Court had before it the loyalty oath imposed on public servants of the State of Oklahoma. Appellants put forth the claim that the oath, as interpreted by the Supreme Court of that state, violated the Fifth Amendment in that it required the employee to swear he had not been a member of subversive organizations, irrespective of whether at the time he joined the organization he was aware of its purpose. The Court agreed. It pointed out that the consequence of discharging persons for disloyalty was to inflict on them

"a badge of infamy." The Court then held that the oath arbitrarily classified "innocent with knowing activity". It therefore violated due process. The Court rejected the "facile generalization that there is no constitutionally protected right to public employment" as a technique "to obscure the issue." Id at 191.[7]

The language of the holding is eminently clear:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 192.

Thus, the inquiry here is not whether Peters had a theoretical "right" to his position. It is whether the procedure which resulted in his discharge was "arbitrary". Plainly it is. The point is ably demonstrated in the dissenting opinions of Justices Black, Frankfurter, Douglas and Jackson in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 142, 149, 174, and 183, and the dissenting opinion of Judge Edgerton in *Bailey* v. *Richardson*, 182 F. 2d 46 (D.C. Cir. 1950). The Justices of this Court who voted to affirm in *Bailey* must have done so, not on the ground that the employee had received due process, but because they believed that "[D]ue process does not apply." See Reed, J., dissenting in the *Joint Anti-Fascist* case, 341 U.S. at 212. The view appears to have been qualified in the *Wieman* case, decided in the light of three years experience under such programs.

If the Government insists on discharging and blacklisting its employees in this formal, ostensibly judicial fashion,

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[7] To the same effect, see Burns, *The "Right to a Government Job"*, 6 *Rutgers L. Rev.* 451 (1952). Whether petitioner's position was a right or a privilege is of no moment. It has always been clear that the Government may not even condition a privilege on an unconstitutional requirement. *Frost* v. *Railroad Commission*, 271 U.S. 583; *U. S. ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U.S. 407; *Perkins* v. *Elg.*, 307 U.S. 325.

then it must grant a hearing which is more than sham. As the Court said in *Morgan* v. *United States*, 304 U.S. 1, 18,

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise, the right may be but a barren one."

The Government should not be permitted to have it both ways. It should not be permitted to designate its procedure as a hearing system, to give an aura of credibility to its findings, and at the same time deny the employee the right to know the evidence against him. It is a constitutional principle and plain common sense that "there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute." *ICC* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93.

Petitioner was discharged without such an opportunity. Such a discharge is arbitrary. Under the authority of the *Wieman* holding, this case must be reversed as punishment inflicted on petitioner without due process of law.

CONCLUSION

The most fundamental subject of constitutional concern is the life and liberty of the individual. Imprisonment of course does not follow the findings of loyalty boards but the penalties are hardly less severe:—ostracism and impoverishment and the denial of access to one's profession and the society of one's friends. This is a real power over the freedom of individuals who are Government employees. It is exercised by officials and boards who need have no training in the law or familiarity with its principles and who do not desire to proceed in the tradition of the law. These men now claim that the Constitution does not limit their power over our civil servants, because to

do so would make it impossible for them to carry out their duties effectively.

In the late twenties and ea ly thirties a similar constitutional claim was made by a multitude of administrative boards—bureaucratic agencies with vast power over property rights. In their early operations these boards conducted themselves with little regard for the traditional rules of procedure. They frequently took the position that their proceedings and decisions were not subject to review by the courts. There resulted a long and difficult struggle to subordinate these agencies to the rule of law and to compel them to bring their procedures into harmony with the basic requirements of fair play which our traditions of due process demand.

Many qualified people thought that to subject these agencies to procedural restrictions, and their decisions to court review, would make it impossible for them to do their work. They felt that the acute economic emergency required that the administrative process should not be subject to judicial restraint or to the hindrance of procedural due process. "Liberals" were particularly energetic in expressing this opinion. However, the "conservative" view prevailed. The administrative process was subjected to due process requirements, and the result was clearly beneficial. Their performance of assigned functions was not materially impaired, and their procedures and decisions were brought into closer conformity with our traditions of fair play.

We are now confronted with a similar struggle, not as to property rights, but in a vastly more important area: the field of individual freedom. The existence of this struggle, together with its fundamental implications, has been obscured because it arises in the context of our battle with Communism. But we are convinced that the procedure in this case is one that does deal with the freedom of individuals, that it does deprive them of fundamental rights, and that rejection of such procedure by this Court

will vastly aid rather than hamper the true objectives of a security program.

The judgment below should be reversed with directions to grant the relief prayed for in the complaint.

Respectfully submitted,

THURMAN ARNOLD,

ABE FORTAS,

PAUL A. PORTER,

MILTON V. FREEMAN,
Counsel for Petitioner.

ARNOLD, FORTAS & PORTER,
1229 - 19th Street, N. W.,
Washington 6, D. C.

FOWLER HARPER,
VERN COUNTRYMAN,
New Haven, Connecticut
Of Counsel.

APPENDIX

Regulation and Constitutional Provisions Involved

Executive Order No. 9835, March 21, 1947, 12 F.R. 1935, as amended by Executive Order No. 10241, April 30, 1951, 16 F.R. 3690

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government;

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U.S.C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I—INVESTIGATION OF APPLICANTS

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PART II—INVESTIGATION OF EMPLOYEES

1. The head of each department and agency in the executive branch of the Government shall be personally respon-

sible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time. (2) of his right to an administrative hearing on such charges before a loyalty Board, and (3) of his right to appeal before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III—RESPONSIBILITIES OF CIVIL SERVICE COMMISSION

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

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PART IV—SECURITY MEASURES IN INVESTIGATIONS

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PART V—STANDARDS

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, there is a reasonable doubt as to the loyalty of the person involved to the Government of the United States.*

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

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* Before being amended by Executive Order 10241, this paragraph of Executive Order 9835 read:

> "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States."

Except for the recited change, which is not central to the issues of this case, the Order is identical to that involved in *Bailey* v. *Richardson, supra.*

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement or group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of facts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI—MISCELLANEOUS

* * *

ARTICLE I, SECTION 9, CLAUSE 3 OF THE CONSTITUTION OF THE UNITED STATES

No Bill of Attainder or ex post facto Law shall be passed.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.